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**UNITED STATES DISTRICT COURT**

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**EASTERN DISTRICT OF TEXAS**

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UNITED STATES OF AMERICA

§

*versus*

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CASE NO. 4:17-CR-41

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BRUCE ALLEN RUTHERFORD

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**MEMORANDUM AND ORDER**

Pending before the court is Defendant Bruce Allen Rutherford's ("Rutherford") Motion for Leave to Appeal In Forma Pauperis ("IFP") (#107). On July 24, 2020, the court denied Rutherford's request for home confinement due to COVID-19. On August 3, 2020, Rutherford filed a notice of appeal, which is pending before the United States Court of Appeals for the Fifth Circuit, No. 20-40511. Shortly thereafter, Rutherford filed the present motion, indicating that he intends to appeal the court's findings that he had not complied with the exhaustion requirement before filing his motion with the court and that he fails to demonstrate extraordinary and compelling reasons warranting compassionate release. Rutherford also attached an Application to Proceed without Prepayment of Fees and Affidavit and a financial statement showing the balance of his inmate account.

Under certain circumstances, the court may grant a party leave to proceed on appeal without prepaying or giving security for fees and costs. 28 U.S.C. § 1915(a); FED. R. APP. P. 24(a). To proceed IFP, a prisoner must submit an affidavit that includes a statement of all assets he possesses demonstrating his inability to prepay or give security for fees and that states the nature of the appeal and the affiant's belief that he is entitled to redress. 28 U.S.C. § 1915(a)(1). If granted leave to proceed IFP, a prisoner is still obligated to pay the full amount of the filing fee over time, when funds exist, through an initial partial filing fee and monthly installments

withdrawn from the prisoner's account. *Id.* § 1915(b)(1), (2); *Hawes v. Stephens*, 964 F.3d 412, 417 (5th Cir. 2020). A prisoner may proceed IFP on appeal only if he is economically eligible and presents a nonfrivolous issue. *See Carson v. Polley*, 689 F.2d 562, 586 (5th Cir. 1982). An issue is not frivolous if it involves "legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983).

Rutherford has more than one appeal currently pending before the Fifth Circuit. In addition to No. 20-40511, Rutherford has a pending interlocutory appeal, No. 20-40244, in his proceeding to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, Civil Action No. 4:19-CV-348, for which the court recently denied Rutherford's request for leave to proceed IFP twice. As noted in the court's orders of May 6, 2020 (#33), and May 26, 2020 (#35), Rutherford is not indigent. As of August 6, 2020, Rutherford's financial data sheet shows a balance of \$777.00, which is sufficient to pay the filing fee of \$505.00.

For the foregoing reasons, Rutherford's Motion for Leave to Appeal IFP (#107) is DENIED.

SIGNED at Beaumont, Texas, this 4th day of September, 2020.



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MARCIA A. CRONE  
UNITED STATES DISTRICT JUDGE